

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GILBERT LEE BARRIENTES,

Defendant-Appellee.

UNPUBLISHED

June 19, 2007

No. 267476

Kent Circuit Court

LC No. 04-006806-FH

Before: Kelly, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of domestic violence, third offense, MCL 750.81(4). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 30 to 180 months' imprisonment. We affirm.

On June 27, 2004, defendant arrived drunk at the residence of his girlfriend, the victim in this case. The victim and defendant began to fight over defendant's drinking. Two witnesses testified that defendant hit the victim repeatedly, causing her to fall on the porch. Another witness testified that she saw defendant "making punching motions" and saw defendant push the victim. When the victim retreated into her residence, defendant confronted the witnesses. Defendant denied that he hit the victim. At trial, the victim testified that defendant had not hit her.

On appeal, defendant first claims that the trial court abused its discretion by admitting telephone recordings that were irrelevant and more prejudicial than probative. He claims the admission of the evidence denied him a fair trial.

This Court reviews a trial court's admission of evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Questions of law related to the admissibility of evidence are reviewed de novo. *Id.* A trial court abuses its discretion if its evidentiary ruling is outside the range of principled outcomes. *People v Orr*, ___ Mich App ___, ___ NW2d ___ (No. 267189, rel'd 5/17/07) slip op p 1, citing *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

The recordings at issue contained defendant's own statements. A party's admissions are excluded from the rule against hearsay, and such admissions are admissible both as substantive evidence and for impeachment under MRE 801(d)(2). *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). But a party's admission is subject to relevancy limitations. *People v McReavy*, 436 Mich 197, 220; 462 NW2d 1 (1990). "Logical relevance is the foundation for admissibility of evidence," *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002), and "[l]ogical relevance is determined by the application of Rules 401 and 402." *People v VanderVliet*, 444 Mich 52, 60; 508 NW2d 114 (1993). Under MRE 402, "[a]ll relevant evidence is admissible." MRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

But relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. "Prejudice" means more than damage to the opponent's case; a party's case is always damaged by evidence that the facts are contrary to his contentions. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). Unfair prejudice exists where it is probable the jury will give undue or preemptive weight to minimally probative evidence, or if it would be inequitable to allow use of the evidence. *Id.* at 75-76 (citation omitted). The determination of the prejudicial effect of evidence is "best left to a contemporaneous assessment of the presentation, credibility, and effect of the testimony" by the trial court. *VanderVliet*, *supra* at 82.

In the instant case, the trial court properly admitted the recordings. As defendant's own statements, the recordings were relevant and added probative force to other evidence. Defendant characterized the recordings as a number of telephone calls he made to the victim with the last call being made approximately one week before the trial. Primarily, the recordings consisted of defendant's questioning their relationship. But a couple of times in the conversation, defendant indicated that he would plead guilty. Also, defendant stated that it did not take long for him to become intoxicated. The trial court ruled the recordings were defendant's statements and that they had "a bearing on the nature of the relationship between" defendant and the victim.

On this record, we conclude that the trial court did not abuse its discretion in admitting the recordings. The elements of an offense are always at issue, *Mills*, *supra* at 71, and the prosecution offered the recordings to prove that a "dating relationship" existed between defendant and the victim under MCL 750.81(4). Contrary to defendant's assertion that there was ample evidence showing that a dating relationship existed, there was only the victim's testimony to establish that element of the offense. In this case, the victim's testimony was questionable,¹

¹ During sentencing, the trial court noted the following:

I presided over this trial, and I saw the terror and the damage done to Sherry Fisher, not only physically, but psychologically and emotionally. She was quite frankly a wreck, and incapable of belief that she said that nothing like this—nothing happened. I don't think she was worthy of belief of exonerating [defendant's] behavior, and the jury didn't either.

and the recordings corroborated the existence of her relationship with defendant. *Id.* at 80. There was no evidence that the jury gave undue or preemptive weight to the challenged evidence or that it would be inequitable to allow use of the evidence. The recordings added to the probative force of the victim's testimony that a dating relationship existed. The trial court's ruling was within the range of principled outcomes, so it was not an abuse of discretion. *Orr, supra*.

In reaching this conclusion, we note that defendant has not expressed clearly any reason to exclude the recordings under MRE 403. First, defendant argued that the evidence should have been excluded, impliedly, because it was duplicative of the victim's testimony that a dating relationship existed. However, defendant cited no authority to support the proposition that the recordings were a needless presentation of cumulative evidence. As discussed previously, the recordings were admissible to corroborate the victim's questionable testimony regarding an element of the offense. See *Mills, supra* at 69-71, 80.

Second, defendant's argument regarding MRE 404 is entirely misplaced. On this record, there is no indication that the recordings were offered as impermissible character evidence.

Third, defendant argues that a juror who worked at the Kent County Jail told him that the recordings were damaging to his case. Thus, he implies they should have been excluded under MRE 403. Defendant cites no authority and provides no analysis on this point. Jurors may consider the evidence that is presented to them in open court during their deliberations. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). We will not interfere with a jury's role as factfinder in determining the weight of the evidence or the credibility of witnesses. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). The fact that the jury found the evidence damaging does not automatically render the evidence inadmissible under MRE 403. See *Mills, supra* at 75-76.

Finally, defendant argues that his right to confrontation was implicated under *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Defendant claims that "the admission of the tape violated his right of confrontation and was prejudicial in this manner also." In *Crawford supra* at 59-62, the United States Supreme Court held that testimonial, out-of-court statements are inadmissible, unless the declarant is available to testify or is subject to cross-examination. Defendant has misapplied *Crawford* because the recordings did not constitute testimonial hearsay. Defendant himself made the recordings and such admissions² are excluded from the rule against hearsay. *Lundy, supra* at 257.

Next, defendant argues on appeal that defense counsel provided ineffective assistance of counsel for the following reasons: (1) failing to effectively cross-examine three witnesses and to develop the theory that the victim's daughter orchestrated testimony to cast defendant in a bad light; (2) failing to object to certain jurors; (3) ignoring defendant's notes during the trial; and (4)

² McCormick's treatise suggests that "personal admissions by the defendant are not excluded by the Confrontation Clause," although such statements were not discussed in *Crawford, supra*. McCormick, Evidence (6th ed), § 252, p 161.

failing to introduce the victim's medical records and photographs. Where the claim for ineffective assistance of counsel is unpreserved, our review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

“To prove that counsel has been ineffective, defendant must show that his counsel's performance was deficient, and that there is a reasonable probability that but for that deficient performance, the result of the trial would have been different.” *Id.* at 57-58. A defendant must overcome “a strong presumption that counsel's performance constituted sound trial strategy.” *Id.* at 58. We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

First, defendant claims that defense counsel's cross-examination of witnesses was ineffective. Defense counsel cross-examined all of the witnesses. Defendant's speculative assertion that defense counsel did not explore the possibility that the victim's daughter orchestrated this proceeding against defendant is without merit. Nothing in the record supports the conclusion that counsel could have established a conspiracy. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy that a court will not review with the benefit of hindsight. *Id.*

Second, defendant contends that defense counsel failed to object to certain jurors during voir dire.³ A trial attorney's decisions with respect to prospective jurors are considered matters of trial strategy, and will not support a claim of ineffective assistance of counsel. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001); *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986). Moreover, defendant's argument is without merit because each prospective juror about whom defendant complains was excused.

Third, defendant asserts that counsel ignored his notes and refused to ask defendant's questions to the witnesses at trial. Such self-serving and bare allegations of ineffective assistance of counsel are not sufficient to make it so. *People v Pickens*, 446 Mich 298, 332-333; 521 NW2d 797 (1994).

Finally, defendant claimed that defense counsel failed to introduce the victim's medical records and photographs. Any decisions relating to the introduction of evidence constitute trial strategy. The failure to introduce evidence constitutes ineffective assistance of counsel only where such an omission denies the defendant a substantial defense, i.e., a defense that might be outcome determinative. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

³ Defendant also complained that defense counsel did not inform the trial court that a juror, who wore a hearing aid on the first day of the proceedings, did not wear a hearing aid on the second day of the proceedings. The record indicated that some members of the jury asked for and received court-supplied hearing devices during voir dire. However, there were no indications in the record that jurors were unable to hear the proceedings. Defendant has thus failed to develop a factual predicate for this claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

What effect the admission of the victim's medical records and photographs might have had on the jury is entirely speculative. The introduction of the evidence could have damaged defendant's case by showing, as the prosecution suggested, that defendant "didn't merely assault a woman, he assaulted a disabled woman." That the evidence had any probative value to the defense is questionable. On this record, we reject defendant's claim of ineffective assistance of counsel. While defendant has contentions with defense counsel's trial strategy, he has not overcome the presumption that counsel's actions constituted sound trial strategy. *Matuszak, supra* at 57-58. Further, we will not substitute our judgment for that of defense counsel in reviewing a claim of ineffective assistance of counsel. *Rockey, supra* at 76-77.

Next, defendant asserts that the testimony of one prosecution witness conflicted with the testimony of two other prosecution witnesses, i.e., that conflict in the testimony establishes that the evidence was insufficient to sustain defendant's conviction. We disagree.

We review sufficiency of the evidence claims de novo, viewing the evidence in the light most favorable to the prosecution to determine if the evidence was sufficient for a rational jury to find the defendant guilty beyond a reasonable doubt. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). The prosecution may offer circumstantial evidence and reasonable inferences as proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). We resolve conflicts regarding the evidence in favor of the prosecution, *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997), and conflicts regarding credibility of witnesses are resolved in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). We will not interfere with a jury's role, as factfinder, in determining the weight of the evidence or the credibility of witnesses. *Williams, supra* at 419.

Domestic violence includes any form of assault. *People v Wilson*, 265 Mich App 386, 393; 695 NW2d 351 (2005). Its elements are established by proving that the defendant and victim are or once were married, dating, sharing a household or have a child in common, and that the defendant either intended to batter the victim or engaged in an unlawful act that placed the victim in reasonable apprehension of being battered. *People v Corbiere*, 220 Mich App 260, 266; 559 NW2d 666 (1996).

Here, the prosecution presented evidence that defendant and victim were in a dating relationship; defendant intended to, and did, batter the victim, and that this was defendant's third such offense. See MCL 750.81(4). The victim testified that she and defendant had dated for approximately one year. Additionally, the prosecution offered recordings by defendant, where defendant indicated that there was a dating relationship. Three witnesses testified that defendant "battered" the victim. While one witness' testimony did not mesh exactly with the testimony of the other two witnesses, she still testified that defendant pushed the victim. Thus, a rational juror could infer from the evidence that defendant either intended to batter the victim or engaged in an unlawful act that placed the victim in reasonable apprehension of being battered. In this case, the jury determined the weight of the evidence and the credibility of the witnesses; we resolve any conflicts regarding the credibility of witnesses in support of the jury's verdict. *Nowack, supra* at 400. Viewing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could, and did, find that the essential elements of domestic violence were proven beyond a reasonable doubt.

Finally, the defendant argues that the exclusion of the victim's medical records and photographs denied him his due process right to present a defense. See *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006). Defendant's argument has no merit. On this record, we find that the trial court did not prevent defendant from presenting exculpatory evidence. It was clear that defendant had access to the medical records and photographs that the victim sought to show the trial court. Further, defendant had an opportunity to cross-examine the victim regarding these documents, but it can be reasonably inferred that defense counsel decided not to do so as a matter of trial strategy. The trial court did not preclude defendant from introducing the purported exculpatory evidence. Instead, the trial court told the victim to address the matter with the prosecutor for whom she was a witness.

We affirm.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Michael R. Smolenski